

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANTOLIN ANDREW MARKS,

Plaintiff,

v.

DEENA GEPHARDT, *et al.*,

Defendants.

Case No. C07-5259RJB

ORDER ADOPTING REPORT
AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U. S. Magistrate Judge J. Kelley Arnold (Dkt. 26) and Plaintiff's Motion to Strike the GEO Defendants' Late Answers and to Enter Default (Dkt. 29). The Court has considered the Report and Recommendation, objections, and the record.

The Report and Recommendation (Dkt. 26) recommends denial of Plaintiff's Motion for Default (Dkt. 23). On November 19, 2007, (four days after the Report and Recommendation was issued) Defendants filed an Amended Answer. Dkt. 28. Plaintiff filed his Motion to Strike the GEO Defendants' Late Answers on November 26, 2007. Dkt. 29. Plaintiff argues that Defendants "are in default" and should not be permitted to file an amended answer. Dkt. 29. Plaintiff opposes the extension of time and argues that his Motion for Default should be granted. Dkts. 31 and 32.

The Report and Recommendation (Dkt. 26) should be adopted. In the Ninth Circuit,

Factors which may be considered by courts in exercising discretion as to the entry of a default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at

1 stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the
2 default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules
of Civil Procedure favoring decisions on the merits.

3 *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986).

4 These factors favor denying the Motion for a Default Judgment. Plaintiff has not shown that there
5 is any possibility of prejudice to his case. At this stage in the litigation, the merits of Plaintiff's claims and
6 the sufficiency of his complaint are unclear. The sum of money at stake in this action favors a denial of the
7 motion. Plaintiff seeks monetary damages in the amount of \$680,000. Dkt. 8. In light of the amount of
8 monetary damages requested, Defendants should be given a reasonable opportunity to defend themselves.
9 Whether there is a possibility of a dispute concerning material facts is unknown. It appears from the record
10 that Defendants' failure to timely file an Answer may be a result of excusable neglect. Defendants filed an
11 Answer on November 9, 2007, but as stated in the Report and Recommendation, the Answer appears to be
12 for a different case involving Plaintiff and some of the above named Defendants. Dkt. 26. Lastly, the
13 overriding policy consideration, that cases should be decided on the merits wherever reasonably possible,
14 favors denial of the Motion for Default. *Id.*

15 Plaintiff's Motion to Strike the Amended Complaint (Dkt. 29) should be denied. Plaintiff has not
16 shown that the Amended Answer was improperly filed considering the totality of the circumstances.

17 Accordingly, it is hereby **ORDERED**:

- 18 (1) The Court **ADOPTS** the Report and Recommendation (Dkt. 26); Plaintiff's Motion for
19 Default (Dkt. 23) is **DENIED**.
20 (2) Plaintiff's Motion to Strike the GEO Defendants' Late Answers and to Enter Default (Dkt.
21 29) is **DENIED**.
22 (3) The Clerk is directed to send copies of this Order to Plaintiff and to the Hon. J. Kelley
23 Arnold.

24 DATED this 3rd day of December, 2007.

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26 
27 ROBERT J. BRYAN
28 United States District Judge